No. 82-1369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN COAL TRAFFIC LEAGUE, *ET AL.*,
Petitioners,

v.

UNITED STATES, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the Interstate Commerce Commission's adoption of a single standard for determining the adequacy of railroad revenues which accomplishes all of the objectives of the governing provision of the Interstate Commerce Act.

2. Whether the court of appeals erred in upholding the Interstate Commerce Commission's choice of procedures to implement its standard for determining the adequacy of railroad revenues.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 691 F.2d 1104. The opinion of the Interstate Commerce Commission (Pet. App. 1b-24b) is reported at 364 I.C.C. 803.

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*A list of the members of the Association of American Railroads is provided in the Appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1982. Timely petitions for rehearing were denied on November 15, 1982. The petition for a writ of certiorari was filed on February 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

For several decades, the Interstate Commerce Commission's regulation of railroads focused on protecting shippers and ignored the railroads' revenue requirements. This one-sided approach to regulation was a primary cause of the railroads' chronic financial difficulties.[1] In the aftermath of the bankruptcy of the Penn Central and several other railroads, which imperiled the industrial base of the Northeast and Midwest,[2] Congress passed a series of remedial acts, including the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 94 Stat. 31 (1976) ("4R Act"), to enhance the financial viability of the nation's railroads. In section 205 of the 4R Act, Congress directly addressed the Commission's neglect of the railroads' revenue needs. It required the Commission to establish standards and procedures for assessing the adequacy of railroad revenues, and directed the Commission to "make an adequate and continuing effort to assist * * * carriers in attaining such revenue levels."[3]

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[1] *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980); S. Rep. No. 94-499, 94th Cong., 1st Sess. 2-4, 10-11 (1975).

[2] *See generally Regional Rail Reorganization Act Cases*, 419 U.S. 102, 107 (1974).

[3] Section 205 provided in pertinent part:

[T]he Commission shall * * * develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repay-

The Commission conducted a series of rulemaking proceedings to implement section 205.[4] While acknowledging that ultimately the adequacy of railroads' revenues could be judged solely by reference to a competitive return on investment standard, the Commission adopted initial rules which gave it broad discretion to examine any "pertinent financial indicators" in making revenue adequacy determinations.[5] Applying these rules in a necessarily subjective manner, the Commission found that railroads earning a rate of return on their investment as low as four percent (which was less than half what the Commission determined to be a competitive return) had "adequate" revenues.[6] However, the Commission pledged to revise the rules as experience dictated.[7]

The financial plight of the railroad industry did not improve. Large government subsidies remained necessary to maintain rail service in the Northeast,[8] and two more major railroads went bankrupt. Faced with this continuing crisis, Congress passed emergency legislation.[9] In addition, Congress once again found

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ment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation, and (b) insure retention and attraction of capital in amounts adequate to support a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenues levels * * *.

[4]*See* Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Revenue Levels*, 358 I.C.C. 844 (1978); Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination)*, 362 I.C.C. 199 (1980).

[5]*See* Ex Parte No. 338, *supra*, 358 I.C.C. at 910; Ex Parte No. 353, *supra*, 362 I.C.C. at 216, 222-24. The rules were codified at 49 C.F.R. § 1109.25 (1978).

[6]Ex Parte No. 353, *supra*, 362 I.C.C. at 327-29.

[7]Ex Parte No. 338, *supra*, 358 I.C.C. at 896.

[8]*See Conrail Reauthorization: Hearings before the Subcomm. on Surface Transp. of the Comm. on Commerce, Science and Transp.*, Serial No. 97-13, 97th Cong., 2d Sess. 13 (1981).

[9]*Rock Island Transition and Employee Assistance Act*, Pub. L. No. 96-254, 94 Stat. 399 (1980); *Milwaukee Railroad Restructuring Act*, Pub. L. No. 96-101, 93 Stat. 736 (1979).

it necessary to revise the Interstate Commerce Act to mandate greater attention to the railroads' revenue needs. Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. In that Act, Congress found that without improved earnings, railroads would suffer a capital shortfall of 16 to 20 billion dollars by 1985, with disastrous effects on the nation's freight transport system. *Id.*, section 2. Congress therefore declared that it was its "overall purpose * * * to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system." H.R. Rep. 96-1430, 96th Cong., 2d Sess. 80 (1980) (conference report).

In section 205 of this Act, Congress amended the revenue adequacy provision of the 4R Act by adding a directive for the Commisssion to "revise as necessary" its revenue adequacy rules, and to complete a proceeding for that purpose within 180 days. While Congress left it to the Commission to devise the proper means to give effect to the statute, Congress made it quite clear that the Commission's previous efforts had been unsatisfactory. For example, the House Commerce Committee stated in its report on the legislation that "previous admonitions by the Congress that the Commission assist carriers in earning adequate revenue levels (49 U.S.C. 10704) have not achieved their goals. As a result, the Committee is establishing a more straightforward mandate. This is a clear directive to ensure financially sound railroads." H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 54 (1980). The Senate Commerce Committee echoed this sentiment, stating that "the very positive substantive and far reaching changes of [the 4R Act] have not achieved their intended results * * *." S. Rep. No. 96-470, 96th Cong., 1st Sess. 5 (1979). And, in floor debate on the House bill, key Congressmen expressed their agreement with the observation of one member that the Commission's then effective rules had produced revenue adequacy thresholds which were so low as to be "totally unrealistic" and "ludicrous." Cong. Rec. H5998-99 (daily ed. July 2, 1980) (remarks of Reps. Harsha, Matsui).

In response to Congress' strengthened mandate, the Commission conducted a new rulemaking proceeding and decided, on the basis of expert testimony in an extensive administrative record, to adopt the single "cost of capital" standard of revenue adequacy (Pet. App. 5b). Under this standard, railroads are deemed to have adequate revenues when they earn a rate of return on their net investment competitive with returns available on other investments of similar risk.[10] The Commission also adopted procedures to implement this standard, including the use of original cost (less depreciation) as the measure of the investment on which railroads were to have the opportunity to earn a competitive return (Pet. App. 9b).[11]

Numerous shipper interests petitioned for review. They argued, *inter alia,* that the Interstate Commerce Act precluded the Commission from adopting a single standard of adequate revenues, and that the Commission was arbitrary and capricious and abused its discretion in its choice of procedures to measure the investment and the rate of return which railroads need the opportunity to earn on that investment. The Third Circuit court of appeals affirmed the Commission's order in a unanimous decision (Pet. App. 1a-35a), finding that the Commission had reasonably interpreted the Interstate Commerce Act, and had acted within its discretion in choosing between alternative means to implement the Act.

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[10]What actually constitutes a competitive return may vary over time. In the decision under review, the Commission found that 11.7 percent was a competitive return for the railroad industry in 1979 (Pet. App. 19b). The Commission has since updated that figure in annual rulemakings. *See* Ex Parte No. 416, *Railroad Revenue Adequacy — 1980 Determination,* 365 I.C.C. 285 (1981); Ex Parte No. 415, *Railroad Cost of Capital — 1981,* 365 I.C.C. 734 (1982); *see also* Ex Parte No. 436, *Railroad Cost of Capital — 1982,* 47 Fed. Reg. 33344 (1982).

[11]The Commission also expressed its intent to consider switching to replacement cost as the measure of railroad investment in a subsequent proceeding (Pet. App. 17b-18b). The Commission has in fact now initiated a rulemaking proceeding to adopt a replacement cost

ARGUMENT

The petition presents no issue warranting review by this Court. Congress established the policy that railroads need the revenues to attract additional capital and directed the Commission to establish objective standards for measuring that need. The court of appeals found that the Commission reasonably implemented Congress' policy.

Nevertheless, the shippers[12] feel that rates should not be as high as the appplication of the standard may allow and that some railroads need lower revenues than the standard might indicate. On the assumption that their feelings are correct, they conclude that the Commission has transgressed congressional policy and abdicated its duty to maintain reasonable rates. And on this basis, the shippers argue that this case "raises critical questions" (Pet. 9) warranting review by this Court.

However, the mere fact that this standard is inconsistent with the shippers' subjective impressions does not warrant review here. This is especially true since the possibility of higher rates was anticipated by Congress, and Congress has provided an independent process by which the Commission and the courts can determine whether any higher rates that may result from this standard are unreasonable.

The shippers also question the economic technicalities of the Commission's choice of methods to ensure that railroads have the opportunity to earn adequate revenues. These are all matters in which the Commission has broad discretion. The shippers have identified no flaw in the court of appeals' reasons for upholding the Commission's exercise of discretion. Moreover, the Commission is currently seeking to improve its technical implementation of Congress' mandate.

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method of asset evaluation and otherwise to modify its method of measuring a railroad's rate of return. *See* Ex Parte No. 393 (Sub-No. 1), *Standards For Railroad Revenue Adequacy*, 48 Fed. Reg. 10144 (1983).

[12] "The shippers" is used herein to refer to all of the parties which filed the petition for a writ of certiorari.

Finally, the shippers argue that the court of appeals' decision conflicts with decisions of other circuits in deferring to the Commission's choice of a method to achieve the purposes of a provision of the tax code designed to stimulate investment. But there is no conflict among the circuits, only a change in agency policy.

1. The shippers claim that the Commission has adopted a standard of adequate revenues that is much too high (Pet. 9). As proof, they assert that the difference between existing earnings levels and levels considered adequate under the standard is "immense," and that rates will have to increase dramatically to cover that difference (Pet. 9-13). Putting aside for the moment the uncertain relationship between this standard and individual rate reasonableness determinations, the fact that revenue levels under the standard may be significantly higher than existing revenue levels does not indicate that the standard is incorrect; it just as easily proves that existing revenue levels are woefully inadequate. Indeed, the latter conclusion is more consistent with the Staggers Act, in which Congress found that vastly higher earnings would be needed to restore the financial health of the railroad industry. *Id.*, sections 2(6), 2(7).

The shippers' position is reminiscent of the approach to rate regulation which Congress sought to eliminate when it enacted the 4R and Staggers Acts. Prior to those Acts, the Commission decided the reasonableness of rates essentially on an *ad hoc* basis, with no attention to overall carrier revenue needs. Based on its judgment that this approach had contributed to the decline of the railroad industry, Congress directed the Commission in those Acts to adopt an objective standard of adequate revenue levels for railroads, and made the attainment of those levels the only explicit standard governing rate reasonableness determinations. *See* 49 U.S.C. §§ 10701a(b)(3), 10704(a)(2). Thus, whereas determinations of the reasonableness of rates are now supposed to depend on the carrier's need for adequate revenues under an objective standard, the shippers are claiming in effect that a carrier's overall revenue opportunities should depend (as they did in the past) on subjective notions of the reasonableness of rates.

Even if the shippers correctly anticipate higher rates, there is no basis for their claim that higher rates are necessarily contrary to Congressional policy. The purpose of the Staggers Act was not to require the Commission to accord greater protection to shippers. Quite the contrary, while the Act preserved the Commission's powers to protect captive shippers,[13] Congress' primary concern was that the Commission had for too long been overly solicitous of shipper interests and too neglectful of the railroads' financial needs. Congress recognized that "earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements," and that rate increases would be required to attract an additional 16 to 20 billion dollars by 1985. Staggers Act, *supra,* section 2. Moreover, Congress adopted the policy that "rail carriers *shall* earn adequate revenues," and made that policy the only explicit standard governing rate reasonableness determinations. 49 U.S.C. § 10701a(b)(3) (emphasis added). Thus, Congress plainly contemplated that the opportunity to earn revenues adequate to attract capital was consonant with the maintenance of reasonable, albeit higher, rates.

Congress not only anticipated that a proper revenue adequacy standard might allow higher rates, but it provided a process to ensure that any such rates would be reasonable. If the shippers are dissatisfied with the results of that process, they will have ample opportunities to seek redress. Thus, there is no basis for the argument that Supreme Court review is necessary to ensure

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[13]Staggers Act, *supra,* § 202, codified at 49 U.S.C. § 10709. Under this provision, the Commission's jurisdiction is preserved only in those instances where railroads have market dominance over their shippers. While it is well accepted that the number of such instances is relatively small compared to the total number of shippers served by railroads (*see* H.R. Rep. No. 96-1430, *supra,* at 92), the record below contains no evidence of what those instances are. Accordingly, there is no basis to accept the assertion (Pet. 7-8) that railroads have market dominance over most of the shippers who have challenged the Commission's decision.

that they receive "the maximum rate protections which Congress intended them to have" (Pet. 9).

As part of that process, the Commission is currently addressing the issue of how to protect shippers in another, ongoing rulemaking proceeding, Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines – Nationwide.* Shippers have an opportunity to shape the Commission's general rate policy in that proceeding.[14] In addition, whether any potentially higher rates for individual shippers would in fact be reasonable would be a matter for the Commission to decide in individual adjudications. The shippers would also be free to seek judicial review of any rule or individual rate decision.[15] Until the Commission actually makes those decisions, it would be beyond the province of this Court to determine *ex ante* the reasonableness of either the Commission's rate policy or any particular rate.[16]

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[14]In its decision served February 24, 1983, in that proceeding, the Commission essentially overruled the earlier statement of one of its administrative law judges cited by the shippers (Pet. 12) that no rate of a revenue inadequate carrier could now be found unreasonable. The Commission also stated (at p. 20) that it had not yet determined in which respects it will judge the reasonableness of rates of railroads not earning adequate revenues differently from those of railroads that are earning adequate revenues. Thus, it is premature to conclude whether the findings of revenue adequacy or inadequacy resulting from the application of the standard adopted by the Commission in this case will even matter once that proceeding is complete.

[15]Many shippers have already petitioned for review of the Commission's rulemaking proposal. *See Western Coal Traffic League v. United States,* No. 83-1204 (D.C. Cir.) and consolidated cases.

[16]Railroads profit more from hauling coal than from hauling alternative fuels, and therefore will continue to encourage the maximum use of coal, regardless of what the Commission might allow. For this reason, no prediction of the level of increases which might result from a more permissive rate regulation policy is possible without an understanding of the discrete market forces governing each separate rail coal service. Similarly, because railroads do not want to lose coal traffic, the petition raises no issue relating to the national energy policy of increased reliance on coal rather than alternative fuels such as imported oil.

2a. While the shippers are quite concerned that their rates may increase, they do not contest the economic soundness of the measure of a proper rate of return adopted by the Commission. Indeed, they have never identified an alternative basis to measure adequacy of revenues that could be applied objectively as a standard. (The Commission's prior rules, which the shippers evidently prefer, gave the Commission unfettered discretion to choose between numerous financial indicators.) Instead, they seek review on the grounds that the court of appeals erred as a matter of law in holding that the Commission could employ a single standard to determine adequacy of railroad revenues (Pet. 14-18). They contend that because the statute specifies other criteria which the standard must satisfy while allowing railroads the opportunity to earn a "reasonable and economic profit or return (or both) on capital employed in the business," the court should have held that the Commission was precluded from adopting "a rate of return on investment equal to the current cost of capital" as the standard of adequate revenues (Pet. 14). They cite several authorities, including a 4R Act Senate Report, dictum from a decision of the D.C. Circuit,[17] and prior statements of the Commission and a member of its staff, all of which state that a reasonable return on investment is not the only statutory objective which the revenue adequacy standards must address (Pet. 15-18).

The flaw in this argument is clear. As the court of appeals recognized (Pet. App. 23a-27a), nothing in the statute or any of these other authorities precluded the Commission from adopting "a single standard encompassing [all of] the objectives listed in section 205 * * *." And that is precisely what the Commission did, after examining the record (Pet. App. 7b-9b). Since the shippers do not suggest that the Commission's rulemaking procedures were unfair, or that the record is inadequate to support the finding that the cost of capital standard gives effect to all of

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[17] *San Antonio, Texas v. United States*, 631 F.2d 831, 850 n.104 (D.C. Cir. 1980), *clarified*, 655 F.2d 1341 (D.C. Cir. 1981), *rev'd on other grounds sub nom. Burlington Northern, Inc. v. United States*, ___ U.S. ___, 74 L. Ed. 2d 311 (1982).

the statutory objectives, this issue does not merit Supreme Court review.

The shippers' contention that by adopting this single standard the Commission altered its interpretation of the Interstate Commerce Act (Pet. 17-18) does not make this case any more appropriate for this Court's review.[18] This Court does not sit to review asserted conflicts in decisions of a single administrative agency. In any event, the court of appeals properly held that an agency has broad discretion to revise its policies, "so long as the policies it is pursuing can be discerned from its opinion, and those policies are consistent with congressional directives * * *" (Pet. App. 20a, citing *Atchison, T., & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973)). The court also found that it was reasonable for the Commission to revise its revenue adequacy standards and procedures in light of the Staggers Act's purpose to "create a regulatory environment more favorable to investment in railroads," and the Commission's experience with its prior rules (Pet. 25a-26a). There is no need for this Court further to scrutinize the integrity of the Commission's decision-making process, especially in light of the soundness of the end result of the Commission's order here.[19]

Finally, with regard to a single standard, the shippers argue that it was improper for the Commission to adopt a standard

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[18]The objection that "the Commission's decision did not even *address* the statutory question of whether Section 10704(a)(2) permitted the use of a single standard" (Pet. 17; emphasis in original) is easily answered. As the agency charged with administering a new statute, the Commission is entitled to great deference in its interpretation. *See Power Reactor Dev. Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961). It need not make explicit its ruling on every possible statutory issue, so long as the basis for its interpetation, as the court of appeals found, was reasonably discernable. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). This is especially the case here since no party in the rulemaking raised the single standard issue.

[19]The fact that the statute directs the Commission to "revise [its standards] as necessary" makes it especially inappropriate to fault the Commission for a change in position.

which looks to the adequacy of returns on investment, since "the 'used and useful' character of significant portions of this [investment] has been called into serious question" (Pet. 14). This objection does not go to the legitimacy of a single standard, but to the measurement of the investment base. In fact, however, the only evidence of record indicated that the amount of property that might be deemed unused and nonuseful was *de minimis* (Pet. App. 9b-10b). Moreover, this issue may soon be moot because the Commission has proposed a new method of valuing rail investment.[20]

b. The shippers also raise arguments concerning the Commission's procedures for implementing the cost of capital standard. As the court of appeals recognized, all of these points essentially involve "choice[s] by an agency among alternative means for satisfying a statutory mandate, [which are] exclusively for that agency" (Pet. App. 20a). *See, e.g., Bowman Transp., Inc. v. Arkansas Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974).

i. In an argument closely related to their objection to the Commission's use of a single standard, the shippers assert that the court of appeals erred in affirming the Commission's decision to include "unused and nonuseful assets" in the investment base on which railroads are to be permitted the opportunity to earn a return (Pet. 19-20). However, as the shippers themselves acknowledge (Pet. 20), neither the court nor the Commission disputed their position that those assets (which the shippers have never identified) should be excluded where practicable. The court merely held that the Commission's decision not to exclude the value of any unused and nonuseful assets in its initial revenue adequacy determination was not arbitrary, capricious, or an abuse of discretion, "because no likelihood of substantial overvaluation was established" (Pet. App. 31a).[21] Therefore,

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[20]See note 11, *supra*. Under the Commission's proposal, the possibility of any overstatement in investment values would be eliminated (see Pet. App. 10b).

[21]The shippers cite evidence submitted by the railroads showing the value of these assets to be less than $225 million (Pet. 20 n.14) but omit to note evidence that that amounts to no more than a fraction of

the error, if any, did not prejudice the shippers, and provided no basis for the court of appeals to reverse the Commission's order. *See* 5 U.S.C. § 706 (in reviewing agency decisions, "due account shall be taken of the rule of prejudicial error").[22]

ii. The shippers contest the court of appeals' holding that the Commission acted within its discretion in deciding to measure the current cost of capital by examining the current cost of debt (together with the current cost of equity), rather than the embedded cost of debt. Since the current cost of debt can exceed the embedded cost of debt, they argue that the Commission's decision conflicted with the statutory directive that revenue levels deemed adequate should "assure the repayment of a reasonable level of debt" (Pet. 20-21). This argument, which is premised on a serious misconstruction of the statute, provides no basis for review by this Court. The shippers do not argue that the standard adopted by the Commission will not "assure the repayment of a reasonable level of debt." Instead they argue, in effect, that the statute should be interpreted to read "earnings may not exceed a level sufficient to cover the embedded cost of debt." Nothing in the statute or Congress' policy requires that reading. As the court of appeals noted, "The specific objectives listed in Section 205 should not * * * be read as *limitations* on revenue * * *" (Pet. App. 25a; emphasis added).

In deciding to use the current cost of debt, which can obviously fall above *or* below the embedded cost of debt, the Commission was properly seeking to allow railroads the opportunity to earn an *overall* return on debt and equity that is competitive in current capital markets (Pet. App. 13b-14b). In af-

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one percent of total investment, which is about $27 *billion* (Pet. App. 10b, citing J.A. 316-17). In fact, the Commission has directly repudiated the suggestion that the investment figures on the railroads' books are significantly overstated (Pet. App. 10b).

[22]In any event, this issue may become moot when the Commission considers adopting its new method of asset valuation. See note 11, *supra.*

firming the Commission on this point, the court of appeals aptly noted that "[i]f the railroads could not gain a rate of return on investment represented by old debt in excess of the old interest rates on such debt, they would be unlikely to attract new equity capital, and their shareholders would insist on investment of internally generated funds outside the rail industry" (Pet. App. 28a). The shippers have identified no flaw in this reasoning. Thus, the Commission acted consistently with the capital attraction goal of Congress and there is no indication that the court of appeals failed to understand the issue.

iii. The shippers contest the court of appeals' affirmance of the Commission's decision not to reduce the railroads' investment bases by the amount of investment equal to the reserves for deferred taxes made possible by the use of accelerated depreciation. They argue that since this investment is "cost-free" to the railroads, it should not be included in the total investment on which railroads are permitted the opportunity to earn a return (Pet. 22-23).[23] The court of appeals soundly disposed of this point, however, when it observed:

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[23]The shippers have consistently ignored the fact that funds represented by deferred tax accounts are provided by the government, which defers taxation to stimulate investment, rather than the rate payers, who would pay no less if taxes were not deferred. The shippers also assert that they are not seeking to deny railroads the opportunity to earn a return on investment financed by deferred taxes, and that they did not argue below against affording railroads that opportunity. In fact, however, that would be the outcome of accepting their position, and they did so argue below. *See* Brief of Edison Electric Institute, et al. dated January 6, 1982, at 42-43 ("Utilities are not permitted to earn a return on deferred tax accounts. * * * There is no reason why the railroads should do so [sic]"); Brief of Western Coal Traffic League dated January 6, 1982, at 47 ("the Commission has reversed its position, holding that carriers should be accorded a return on deferred taxes. Obviously, this holding * * * must be set aside"). That outcome would result because under their proposal assets equivalent in amount to the deferred tax reserve would be deducted from the investment base on which a return is allowed.

> The simple fact remains * * * that for all businesses accelerated depreciation is a source of funds which may be reinvested. If the railroad industry were to be put in the position that unlike unregulated industries it could not earn a rate of return on investment of such funds it would be at a competitive disadvantage in seeking equity capital, and it would be encouraged to invest the funds generated from accelerated depreciation elsewhere than in the railroad business [Pet. App. 33a].

The shippers also cite no error in this rationale.

3. Finally, the shippers' further argument that the court of appeals' ruling on the treatment of assets equal to deferred tax revenues conflicts with decisions of three other circuits (Pet. 22-23) is not borne out by a reading of those decisions. In all three of those cases, which involved the lawfulness of particular rates and not the adequacy of overall railroad revenues, the court faulted the Commission for failing to follow its earlier policy of excluding amounts equal to the deferred tax reserve account from the investment base.[24] In this case, the court of appeals has upheld the Commission's decision to change that policy. Thus, the courts have been consistent in deferring to the

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[24] *Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 586 (6th Cir. 1981); *Iowa Public Serv. Co. v. ICC*, 643 F.2d 542, 546-47 (8th Cir. 1981); *San Antonio, Texas v. United States, supra*, 631 F.2d at 847. While the court in *San Antonio* stated that excluding deferred taxes from the investment base is "an essential component of an agency's election to normalize taxes for ratemaking purposes" (*id;* footnote omitted), that statement was dictum in light of the holding that the Commission had disregarded its own policy. Moreover, the authorities cited by the court suggest that it was not aware of the fundamental distinction between railroads, which operate in predominantly competitive markets, and regulated utilities, which do not. As a result of this distinction, tax incentives which may be unnecessary to encourage investment in a public utility are vital to railroads. *See* J.A. 567-68.

Commission's judgment on this issue, even as that judgment has changed, and there is no conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

ASSOCIATION OF AMERICAN RAILROADS MEMBERSHIP LIST

Akron, Canton & Youngstown R.R.
Alton & Southern Ry.
Amtrak
Atchison, Topeka & Santa Fe Ry.
Atlanta & St. Andrews Bay Ry.
Baltimore & Ohio R.R.
Baltimore & Ohio Chicago Term. R.R.
Bangor & Aroostook R.R. Co.
Belt Ry. Company of Chicago
Bessemer & Lake Erie R.R.
Boston & Maine Corporation
Burlington Northern Railroad Co.
Canadian Pacific Ltd.
Chesapeake & Ohio Ry.
Chicago & Illinois Midland Ry.
Chicago & North Western Transportation Co.
Chicago & Western Indiana R.R.
Chicago, Milwaukee, St. Paul & Pac. R.R.
Clinchfield R.R.
Colorado & Southern Ry.
Consolidated Rail Corporation
Denver & Rio Grande Western R.R.
Detroit & Mackinac Ry.
Detroit & Toledo Shore Line R.R.
Detroit, Toledo & Ironton R.R.
Duluth, Missabe & Iron Range Ry.
Elgin, Joliet & Eastern Ry.
Fort Worth & Denver Ry.
Galveston Houston & Henderson R.R.
Georgia R.R.
Grand Trunk Lines
Green Bay & Western R.R.
Houston Belt & Terminal Ry.

Illinois Central Gulf R.R.
Kansas City Southern Ry.
Kentucky & Indiana Terminal R.R.
Lake Superior & Ishpeming R.R.
Louisiana & Arkansas Ry.
Louisville & Nashville R.R.
McCloud River R.R.
Maine Central R.R.
Manufacturers Ry.
Minneapolis, Northfield and Southern Ry., Inc.
Missouri-Kansas-Texas R.R.
Missouri Pacific R.R.
Norfolk & Western Ry.
Peoria & Pekin Union Ry.
Pittsburgh & Lake Erie R.R.
Pittsburg & Shawmut R.R.
Prescott & Northwestern R.R.
Richmond, Fredericksburg & Potomac R.R.
St. Louis Southwestern Ry.
Seabord Coast Line R.R.
Soo Line R.R.
Southern Pacific Transportation Co.
Southern Ry. Co.
Texas Mexican Ry.
Union R.R. (Pittsburgh)
Union Pacific R.R.
Vermont Ry.
Western Maryland Railway
Western Pacific R.R.
Western Railway of Alabama
Winston-Salem Southbound Ry.

CANADIAN LINES

Algoma Central Ry.
Canadian National Rys.
Canadian Pacific Limited
Ontario Northland Ry.
Toronto, Hamilton & Buffalo Ry.

MEXICAN LINES

Chihuahua-Pacific Ry.
Direccion General De Ferrocarriles En Operacion
National Railways of Mexico